DEPARTMENT OF STATE REVENUE

18-20140264.LOF

Letter of Findings: 18-20140264
Financial Institutions Tax
For the Years 2008, 2009, and 2010

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

ISSUES

I. Financial Institutions Tax - Receipts Addback.

Authority: IC § 6-5.5 et seq.; IC § 6-5.5-2-1(a); IC § 6-5.5-2-4; IC § 6-5.5-3-1; IC § 6-8.1-5-1(c); 45 IAC 17-2-1(a); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012; Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer argues that the Department of Revenue's audit improperly disallowed certain intercompany eliminations between two of its subsidiary corporations.

II. Financial Institutions Tax - Exclusion of Parent Company.

Authority: IC § 6-5.5-1-17(a); IC § 6-5.5-1-17(d); IC § 6-5.5-1-17(d)(1); IC § 6-5.5-1-17(d)(2); IC § 6-5.5-1-18(a); IC § 6-5.5-2-1; IC § 6-5.5-2-8(a)(1); IC § 6-5.5-2-8(a)(2); IC § 6-5.5-2-8; IC § 6-5.5-5-8(a)(2); IC § 6-5.5-3-1; IC § 6-8.1-5-1(c); 45 IAC 17-2-1.

Taxpayer maintains that Parent Company is transacting the business of a financial institution in Indiana and that the audit's conclusion to the contrary was mistaken.

III. Financial Institutions Tax - Exclusion of Community Development Corporation.

Authority: IC § 6-5.5-1-17(a); IC § 6-5.5-1-17(a)(3); IC § 6-5.5-1-17(d)(1); IC § 6-5.5-1-17(d)(2); IC § 6-5.5-1-18(a); IC § 6-5.5-2-8; IC § 6-5.5-2-8(a)(1); IC § 6-5.5-2-8(a)(2); IC § 6-5.5-3-1; IC § 6-8.1-5-1(c).

Taxpayer claims that its Community Development Corporation is transacting the business of a financial institution in Indiana and the audit's conclusion to the contrary was mistaken.

STATEMENT OF FACTS

Taxpayer is an out-of-state holding company. Taxpayer's principal subsidiary is designated as "Parent Company" through which most of its banking services are provided and which - in turn - operates various subsidiaries including entities here designated as "Delaware Subsidiary" and "Equity Subsidiary." Taxpayer and its subsidiaries have various Indiana business locations in this state and provide various commercial and retail banking services to Indiana customers.

The Indiana Department of Revenue ("Department") conducted a Financial Institutions Tax ("FIT") audit of Taxpayer's business records and tax returns. The audit resulted in the assessment of additional FIT. Taxpayer disagreed with the audit's conclusions and submitted a protest to that effect. An administrative hearing was conducted and this Letter of Findings results.

I. Financial Institutions Tax - Receipts Addback.

DISCUSSION

Indiana imposes a Financial Institutions Tax at IC § 6-5.5-2-1(a) as follows:

> There is imposed on each taxpayer a franchise tax measured by the taxpayer's apportioned income for the

> privilege of exercising its franchise or the corporate privilege of transacting the business of a financial institution in Indiana. (Emphasis added).

"Taxpayer's apportioned income," is defined at IC § 6-5.5-2-4 as follows:

> For a taxpayer filing a combined return for its unitary group, the group's apportioned income for a taxable year consists of: (1) the aggregate adjusted gross income, from whatever source derived, of the members of the unitary group; multiplied by (2) the quotient of: (A) all the receipts of the taxpayer members of the unitary group that are attributable to transacting business in Indiana; divided by (B) the receipts of all the members of the unitary group from transacting business in all taxing jurisdictions.

The FIT is imposed on corporations transacting the business of a financial institution inside the state. IC § 6-5.5 et seq. The FIT is imposed on resident financial institutions, nonresident financial institutions, and non-bank entities that transact the business of a financial institution. 45 IAC 17-2-1(a). Non-resident corporations, such as the Taxpayer, transacting the business of a financial institution are included in the FIT when they meet one of the eight tests listed in IC § 6-5.5-3-1 whereby the non-resident corporation demonstrates that it has established an economic presence in Indiana. For the purpose of determining whether a taxpayer is qualified to file as a financial institution, the taxpayer will have established an economic presence in Indiana if the taxpayer:

> (1) maintains an office in Indiana; (2) has an employee, representative, or independent contractor conducting business in Indiana; (3) regularly sells products or services of any kind or nature to customers in Indiana that receive the product or service in Indiana; (4) regularly solicits business from potential customers in Indiana; (5) regularly performs services outside Indiana that are consumed within Indiana; (6) regularly engages in transactions with customers in Indiana that involve intangible property, including loans, but not property described in section 8(5) of this chapter, and result in receipts flowing to the taxpayer within Indiana; (7) owns or leases tangible personal or real property located in Indiana; or (8) regularly solicits and receives deposits from customers in Indiana. IC § 6-5.5-3-1.

After reviewing its returns, the Department's audit made a decision to exclude Taxpayer's intercompany eliminations of the distributive shares of a Delaware Subsidiary on the ground that the "receipts of [Delaware Subsidiary] were not included in the calculation of apportionment[,] the reported intercompany elimination of the [Delaware Subsidiary] improperly reduced the receipts."

The audit concluded as follows:

> Adjustments are proposed (1) to exclude [from the numerator] the Indiana receipts reported by [Parent Company] and [Community Development Corporation] , and (2) exclude intercompany elimination of unreported receipts of [Delaware Subsidiary].
>
> Adjustments are proposed (1) to exclude [from the denominator] the receipts reported by [Parent Company] and [Community Development Corporation], and (2) exclude intercompany elimination of unreported receipts of [Delaware Subsidiary].

In part, the decision was predicated on Taxpayer's purported reluctance to explain the operation of Delaware Subsidiary, "providing only the results of a prior audit which allowed intercompany eliminations."

Taxpayer points to a statement in the audit report which states that:

> Intercompany eliminations would be appropriate had the [T]axpayer included for apportionment the receipts [Delaware Subsidiary] and the distribute shares to [Equity Subsidiary] and [Parent Company]. Since receipts of [Delaware Subsidiary] were not included in the calculation of apportionment the reported intercompany elimination of the [Delaware Subsidiary] improperly reduced the receipts. (Emphasis added).

Taxpayer argues that the receipts for Delaware Subsidiary are properly accounted for on the Parent Company's and Delaware Subsidiary's federal returns and that the income from Delaware Subsidiary is reported as interest income from flow through activity on its returns. Taxpayer further explains that the "interest income is recorded on the returns for [Parent Company] and [Equity Subsidiary] as a Sch. M-1 adjustment" and that "[t]hese adjustments can be seen in detail included with the Federal Workpapers [and] are included with this audit protest."

The audit concluded that it was appropriate to exclude the claimed intercompany eliminations in both the numerator and denominator as described. Taxpayer argues the receipts for both Delaware Subsidiary and Equity

Subsidiary were both properly accounted and the exclusion of eliminations was unwarranted. Moreover, Taxpayer has provided a detailed explanation of its argument.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of state Revenue, 977 N.E.2d 480, 486, fn. 9 (Ind. Tax Ct. 2012).

Taxpayer has provided an accounting of the income and supporting documentation sufficient to warrant review of the Taxpayer's written explanation and the additional documents submitted by Taxpayer.

FINDING

Subject to review by the Audit Division, Taxpayer's protest is sustained to the extent that the supplemental audit supports Taxpayer's claim.

II. Financial Institutions Tax - Exclusion of Parent Company.

DISCUSSION

The FIT is imposed on taxpayers transacting the business of a financial institution within this state. IC § 6-5.5-2-1. 45 IAC 17-2-1 explains that the FIT "is intended to tax both traditional financial institutions that are transacting business within Indiana, as well as other types of businesses that are deemed to be transacting the business of a financial institution in Indiana."

The Department's audit removed Parent Company from the unitary group in Taxpayer's Indiana FIT returns. The audit did so on the ground that "[Parent Company] does not transact business in Indiana as required in IC § 6-5.5-3-1." The audit found that "[Parent Company] does not have an Indiana office or Indiana representatives . . . does not sell products or services, does not have Indiana customers, and does not own or lease property in Indiana." Instead, [Parent Company] is a limited partner in a partnership which holds an interest in another partnership which operates a shopping center and holds partnership interests in a lease partnership and a garage partnership." The audit explained that "[t]he activities of the two limited partnerships do not meet the requirements of transacting the business of a financial institution required for inclusion of the partnership results under IC § 6-5.5-2-8(a)(2)."

Taxpayer disagrees and states that Parent Company is "indeed transacting business via a partnership in the State of Indiana [and] therefore would be [] considered a 'Unitary Business' for Indiana purposes" under IC § 6-5.5-1-18(a).

For FIT purposes, a "Taxpayer" is defined at IC § 6-5.5-1-17(a) which provides in relevant part:

> (a) "Taxpayer" means a corporation that is transacting the business of a financial institution in Indiana, including any of the following:
> (1) A holding company.
> (2) A regulated financial corporation.
> (3) A subsidiary of a holding company or regulated financial corporation.
> (4) Any other corporation organized under the laws of the United States, this state, another taxing jurisdiction, or a foreign government that is carrying on the business of a financial institution. (Emphasis added).

IC § 6-5.5-3-1 explains what constitutes "carrying on the business of a financial institution":

> For the purposes of this article, a taxpayer is transacting business within Indiana in a taxable year only if the taxpayer:
> (1) maintains an office in Indiana;
> (2) has an employee, representative, or independent contractor conducting business in Indiana;

(3) regularly sells products or services of any kind or nature to customers in Indiana that receive the product or service in Indiana;
(4) regularly solicits business from potential customers in Indiana;
(5) regularly performs services outside Indiana that are consumed within Indiana;
(6) regularly engages in transactions with customers in Indiana that involve intangible property, including loans, but not property described in section 8(5) of this chapter, and result in receipts flowing to the taxpayer from within Indiana;
(7) owns or leases tangible personal or real property located in Indiana; or
(8) regularly solicits and receives deposits from customers in Indiana.

IC § 6-5.5-1-18(a) explains what constitutes a "unitary business" and what entities should or should not be included in the unitary return.

> "Unitary business" means business activities or operations that are of mutual benefit, dependent upon, or contributory to one another, individually or as a group, in transacting the business of a financial institution. The term may be applied within a single legal entity or between multiple entities and without regard to whether each entity is a corporation, a partnership, a limited liability company, or a trust, provided that each member is either a holding company, a regulated financial corporation, a subsidiary of either, a corporation that conducts the business of a financial institution under IC 6-5.5-1-17(d)(2), or any other entity, regardless of its form, that conducts activities that would constitute the business of a financial institution under IC 6-5.5-1-17(d)(2) if the activities were conducted by a corporation. The term "unitary group" includes those entities that are engaged in a unitary business transacted wholly or partially within Indiana. However, the term does not include an entity that does not transact business in Indiana. (Emphasis added).

Taxpayer argues that Parent Company is engaged in activities which constitute "transacting business within" Indiana by virtue of the fact that it holds a minority interest as a limited partner (Limited Partner 1) which holds an interest in a second limited partnership (Limited Partner 2) which leases space in an Indiana shopping center. In other words, Taxpayer states that Parent Company leases Indiana real estate through a limited partnership which holds an interest in another limited partnership.

IC § 6-5.5-2-8 provides in part that:

> (a) If a corporation is:
> (1) transacting the business of a financial institution (as defined in IC 6-5.5-1-17(d)); and
> (2) is a partner in a partnership or the grantor and beneficiary of a trust transacting business in Indiana and the partnership or trust is conducting in Indiana an activity or activities that would constitute the business of a financial institution if transacted by a corporation; the corporation is a taxpayer under this article and shall, in calculating the corporation's tax liability under this article, include in the corporation's adjusted or apportioned income the corporation's percentage of the partnership or trust adjusted gross income or apportioned income. (Emphasis added).

"Carrying on the business of a financial institution" is defined at IC § 6-5.5-1-17(d):

> For purposes of this section and when used in this article, "business of a financial institution means the following:
> (1) For a holding company, a regulated financial corporation, or a subsidiary of either, the activities that each is authorized to perform under federal or state law, including the activities authorized by regulation or order of the Federal Reserve Board for such a subsidiary under Section 4(c)(8) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(c)(8)), as in effect on December 31, 1990.
> (2) For any other corporation described in subsection (a)(4), all of the corporation's business activities if eighty percent (80[percent]) or more of the corporation's gross income, excluding extraordinary income, is derived from one (1) or more of the following activities:
> (A) Making, acquiring, selling, or servicing loans or extensions of credit. For the purpose of this subdivision, loans and extensions of credit include:
> (i) secured or unsecured consumer loans;
> (ii) installment obligations;
> (iii) mortgage or other secured loans on real estate or tangible personal property;
> (iv) credit card loans;
> (v) secured and unsecured commercial loans of any type;
> (vi) letters of credit and acceptance of drafts;
> (vii) loans arising in factoring; and

(viii) any other transactions with a comparable economic effect.

(B) Leasing or acting as an agent, broker, or advisor in connection with leasing real and personal property that is the economic equivalent of the extension of credit if the transaction is not treated as a lease for federal income tax purposes.

(C) Operating a credit card, debit card, charge card, or similar business.

The "business of a financial institution" is defined by meeting either one of two tests. The first test is whether is a "holding company, a regulated financial corporation, or a subsidiary of either" and engaged in activities under specific state or federal law. IC § 6-5.5-1-17(d)(1). Once this test is met, the company is automatically considered to be a "financial institution, regardless of the actual source of the company's income.

The second test is an income based test. To meet this test, a company must derive eighty percent or more of its gross income from certain specified sources. IC § 6-5.5-1-17(d)(2).

Taxpayer is a federally regulated bank holding company is thus generally "transacting the business of a financial institution" as required under IC § 6-5.5-2-8(a)(1). The issue is whether Limited Partner 1 and Limited Partner 2 have "activity or activities that would constitute the business of a financial institution if transacted by a corporation." IC § 6-5.5-2-8(a)(2).

In this case, Limited Partner 1 and Limited Partner 2 are not organizations described in IC § 6-5.5-1-17(d)(1). Limited Partner 2 leases space in an Indiana shopping mall and operates a shopping mall. Limited Partner 2's activities are not leases "that [are] the economic equivalent of the extension of credit" or any other activity described in IC § 6-5.5-1-17(d)(2). Limited Partner 1's activities consist solely of owning Limited Partner 2 and similarly do not meet the requirement of IC § 6-5.5-1-17(d)(2). Therefore, Limited Partner 1 and Limited Partner 2 do not meet the requirements of "transacting the business of a financial institution" in Indiana necessary for inclusion of the partnership under IC § 6-5.5-5-8(a)(2), even if Taxpayer's ownership of Limited Partner 1 and Limited Partner 2 is permitted under Indiana and federal law. However, Taxpayer's interest in Limited Partner 1 is sufficient to permit taxation under IC § 6-3 the state's adjusted gross income tax regime.

The audit was correct in removing Parent Company from the FIT unitary return because neither Parent Company, Limited Partner 1, nor Limited Partner 2 are conducting the business of a financial institution in this state.

Taxpayer fails to meet its burden under IC § 6-8.1-5-1(c) of demonstrating that removing Parent Company from the unitary FIT unitary group was "wrong."

FINDING

Taxpayer's protest is respectfully denied.

III. Financial Institutions Tax - Exclusion of Community Development Corporation.

FINDING

According to the Department's audit report, Taxpayer's Community Development Corporation ("CDC") - one of its subsidiaries - reports an ownership interest in several low income housing tax credit partnerships but that the "subsidiary reports no Indiana activity other than the interest in these partnerships."

The audit concluded that the CDC did not transact business in Indiana under IC § 6-5.5-3-1. Instead, the CDC:

> holds limited partnership interests in Low Income Housing Tax Credit partnerships. These are passive investments from which the [CDC] receives pro-rata distributions of income, expenses, and tax credits. The [CDC] does not own or lease the real property associated with the low income housing.

The audit report explains in some detail the background of "Low Income Housing Tax Credit Partnerships."

> The Tax Reform Acts of 1986 established the Low-Income Housing Tax Credit (LIHTC) . . . program to provide market incentives to acquire and develop or rehabilitate affordable rental housing as provided in Internal Revenue Code § 42. Developers typically structure LIHTC projects as limited partnerships or limited liability companies providing limited liability to bank investors which make direct investments in either single LIHTC projects or LIHTC fund investments.

> Each year the IRS allocates housing tax credits to designated state agencies, typically state housing finance agencies, which award the credits to developers of qualified projects. The developer may claim housing tax credits directly; however, to raise equity capital the developer generally sells the tax credits either directly to an investor or to a syndicator who assembles a group of investors. Usually a limited partnership is created to meet the requirement that the credit purchaser is a part of the property ownership entity. The limited liability credit purchasers own 99[percent] and are limited to a passive investment role. The general partner generally owns 1[percent] and is responsible for managing the project and the partnership.
>
> The investor buys a financial asset in the form of a stream of tax benefits, both credits and losses associated with depreciation and interest. In addition the bank investor receives investment credit for the Community Reinvestment Act . . . which evaluates the bank's operations in all communities in which they are chartered to do business.

The audit found that the CDC would have met the definition of a taxpayer under IC § 6-5.5-1-17(a)(3) which provides as follows:

> (a) "Taxpayer" means a corporation that is transacting the business of a financial institution in Indiana, including any of the following:
> (1) A holding company.
> (2) A regulated financial corporation.
> (3) A subsidiary of a holding company or regulated financial corporation.

However, because the CDC did not transact business in Indiana as required under IC § 6-5.5-1-18(a) and IC § 6-5.5-1-17(a), it should not have been included in the unitary return.

IC § 6-5.5-1-18(a) explains the FIT's "unitary" concept and what does and does not belong in a unitary return.

> "Unitary business" means business activities or operations that are of mutual benefit, dependent upon, or contributory to one another, individually or as a group, in transacting the business of a financial institution. The term may be applied within a single legal entity or between multiple entities and without regard to whether each entity is a corporation, a partnership, a limited liability company, or a trust, provided that each member is either a holding company, a regulated financial corporation, a subsidiary of either, a corporation that conducts the business of a financial institution under IC 6-5.5-1-17(d)(2), or any other entity, regardless of its form, that conducts activities that would constitute the business of a financial institution under IC 6-5.5-1-17(d)(2) if the activities were conducted by a corporation. The term "unitary group" includes those entities that are engaged in a unitary business transacted wholly or partially within Indiana. However, the term does not include an entity that does not transact business in Indiana. (Emphasis added).

A taxpayer is "transacting business in Indiana" if it meets one of the criteria set out in IC § 6 -5.5-3-1.

> For the purposes of this article, a taxpayer is transacting business within Indiana in a taxable year only if the taxpayer:
> (1) maintains an office in Indiana;
> (2) has an employee, representative, or independent contractor conducting business in Indiana;
> (3) regularly sells products or services of any kind or nature to customers in Indiana that receive the product or service in Indiana;
> (4) regularly solicits business from potential customers in Indiana;
> (5) regularly performs services outside Indiana that are consumed within Indiana;
> (6) regularly engages in transactions with customers in Indiana that involve intangible property, including loans, but not property described in section 8(5) of this chapter, and result in receipts flowing to the taxpayer from within Indiana;
> (7) owns or leases tangible personal or real property located in Indiana; or
> (8) regularly solicits and receives deposits from customers in Indiana.

The audit found that the CDC merely "holds limited partnership interest in LIHTC partnerships" which are "passive investments from which the corporation receives pro-rata distributions of income, expenses, and tax credits" and that the CDC "does not own or lease the real property associated with the low income housing."

IC § 6-5.5-2-8 provides in part that:

> (a) If a corporation is:

> (1) transacting the business of a financial institution (as defined in IC 6-5.5-1-17(d)); and
> (2) is a partner in a partnership or the grantor and beneficiary of a trust transacting business in Indiana and the partnership or trust is conducting in Indiana an activity or activities that would constitute the business of a financial institution if transacted by a corporation; the corporation is a taxpayer under this article and shall, in calculating the corporation's tax liability under this article, include in the corporation's adjusted or apportioned income the corporation's percentage of the partnership or trust adjusted gross income or apportioned income. (Emphasis added).

Taxpayer is a federally regulated bank holding company and is thus generally "transacting the business of a financial institution" as required under IC § 6-5.5-2-8(a)(1). However, the issue is whether the CDC is a partnership that conducts Indiana "activity or activities that would constitute the business of a financial institution if transacted by a corporation." IC § 6-5.5-2-8(a)(2).

As noted in Part II, the "business of a financial institution" is defined by meeting either one of two tests. The first test is whether is a "holding company, a regulated financial corporation, or a subsidiary of either" and engaged in activities under specific state or federal law. IC § 6-5.5-1-17(d)(1). Once this test is met, the company is automatically considered to be conducting the business of a "financial institution, regardless of the actual source of the company's income.

The second test is an income based test. To meet this test, a company must derive eighty or more percent of its gross income from certain specified sources which include: Making, acquiring, selling or servicing loans or extensions of credit; Leasing that is the economic equivalent of the extension of credit; Operating a credit card or similar business. IC § 6-5.5-1-17(d)(2).

The audit pointed out that the Low Income Housing Tax Credit Partnerships are formed by developers to sell the rights to future credits in exchange for "up-front cash." According to the audit report, these partnerships "do not extend credit, lease property that is the equivalent of extending credit, or operate a credit card business." See IC § 6-5.5-1-17(d)(2). As such, the audit found the limited partnerships were not conducting the "business of a financial institution" under IC § 6-5.5-1-17(d)(2). The audit concluded that the results of the partnerships could not be included in the calculation of the Taxpayer's apportioned income subject to the FIT under IC § 6-5.5-2-8(a)(2).

The audit recognized that the CDC - as a subsidiary of a bank holding company - is eligible to be a "taxpayer" under IC § 6-5.5-1-17(a). However, since the CDC's activities consist solely in holding interests in limited partnerships, the CDC did not transact business in Indiana under IC § 6-5.5-3-1. The audit found that holding an interest in the limited partnerships did not meet the requirements of "transacting the business of a financial institution" necessary to include the partnership results under IC § 6-5.5-2-8(a)(2). Therefore, the CDC did not meet the requirement set out in IC § 6-5.5-2-8(a)(2).

The audit concluded that:

> This audit finds that the limited partnerships report the distributive share of a passive investment in a [LIHTC] partnership, an activity which does not meet the definition of transacting the business of a financial institution. However the Indiana activities of the [LIHTC] partnerships are sufficient to permit taxation of the [CDC] for Indiana Adjusted Gross Income Tax under IC § 6-3.

Taxpayer states that the LIHTC projects are a part of CDC's business function "although they are not the sole function of the company." (Emphasis omitted). Taxpayer states that the CDC "currently engages in community focused lending and investment activities authorized by the [Bank Holding Company ("BHC") Act] and [Bank Holding Companies Regulation Y] . . . ." In particular, Taxpayer points out that the CDC engages in certain activities such as: A small business investment company authorized by the BHC Act; Five percent or less investments authorized by the BHC Act; "One Merchant Banking Investment" authorized by the BHC Act; Commercial lending activities pursuant to the BCH Act Activities and Regulation Y.

In addition, Taxpayer points out that the CDC engages in various activities in Indiana such as: (1) loans to borrowers seeking affordable housing rehabilitation and construction; (2) loans to not-for-profit organizations developing low and moderate income housing; (3) loans to borrowers intending to construct or rehabilitate community facilities located in low and moderate income areas; (4) loans to financial "intermediaries" such as Community Development Financial Institutions and minority and women owned financial institutions; (5) loans to local, state, and tribal governments for community development activities; (6) loans to borrowers to finance environmental clean-up or to redevelop industrial sites as part of an effort to revitalize the low- or moderate-income community in which the property is located; and loans for the rehabilitation and construction

communities to remediate environmental hazards such as lead-based paint.

To bolster its argument that the CDC is conducting the business of a financial institution in Indiana, Taxpayer included 2008 through 2011 documentation which details the specific loan activity in the state and which records the balance of loans from Taxpayer's general ledger and as reported on the federal 1120 forms.

Assuming without knowing - and subject to audit verification - that the CDC meets the 80 percent threshold as required under IC § 6-5.5-1-17(d)(2), Taxpayer has met its burden under IC § 6-8.1-5-1(c) of presenting a colorable argument that the CDC's activities include more than passive investments but has a diverse portfolio of business activities in this state and that the CDC regularly transacts business within Indiana through a variety of community development oriented focused lending and investment activities and that - as a result - should have been included in the Taxpayer's unitary group.

FINDING

Subject to verification by the Department's Audit Division that the CDC meets the statutory 80 percent threshold, Taxpayer's protest is sustained.

SUMMARY

Subject to review by the Department's Audit Division, Taxpayer's challenge to the disallowance of specified intercompany eliminations is sustained; the Department's audit correctly excluded Parent Company from the Taxpayer's unitary FIT return; subject to verification by the Department's Audit Division, Taxpayer's challenge of the audit's exclusion of the CDC is sustained.

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